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DIVORCE, UNDER THE INDIANA LAW, FOR ABANDONMENT, CRUELTY OR FAILURE TO PROVIDE

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No divorce can be granted unless some statute empowers the court to grant it for causes specified in the statute. This is elementary, and obtains in every state.[1] If some statute does not declare a divorce can be granted for a particular fault or delinquency, none can be granted. Unchastity is one of these instances in this state.[2] Divorce cannot be granted merely because both of the parties desire one.[3] Thus where the defendant filed a cross-complaint praying that he be granted a divorce, the court said: "Nor does it matter that both have prayed a divorce. Their concurrent wish or even consent will not justify a divorce."[4] Nor can a divorce be granted to both the plaintiff and to the defendant on his cross bill.[5] In every divorce case the state is a third party.[6] This is true when an appeal is taken.[7] And the court in a way represents the state, especially when there is no defense and the defendant does not appear. In that capacity the court may examine the plaintiff, and should ascertain if he is a fit person to receive a divorce, and if he has committed any marital offense; and if he has, refuse the divorce.[8]

[1] *Williams v. Williams*, 136 Ky. 71, 123 S. W. 337; *Umbach v. Umbach*, 183 N. Y. App. Div. 495, 171 N. Y. Supp. 138.

[2] *Curry v. Curry*, Wilson's Ind. Rep. 236; *Eikenberry v. Eikenberry*, 33 Ind. App. 69, 70 N. E. 837.

[3] *Scott v. Scott*, 17 Ind. 309.

[4] *Gullett v. Gullett*, 25 Ind. 517; *Alexander v. Alexander*, 140 Ind. 555, 38 N. E. 855.

[5] *Alexander v. Alexander*, 140 Ind. 555, 38 N. E. 855 (case reversed). See *Scott v. Scott*, 17 Ind. 303; *Chistenberry v. Chistenberry*, 3 Blackf. 202.

[6] *Geager v. Geager*, 43 Ind. App. 313, 87 N. E. 144; *Bacon v. Bacon*, 43 Ind. App. 218, 86 N. E. 1030.

[7] *Edward v. Edward*, 72 Ind. App. 638, 125 N. E. 460.

[8] *Eikenberry v. Eikenberry*, 33 Ind. App. 69, 70 N. E. 837.

"Public policy requires that there be no severance of the marital relations without adequate cause."[9] "Society and the state are interested in upholding the marriage relation, and statutory safeguards thrown around it will therefore be strictly insisted upon. No divorce will be granted except in the cases provided by law."[10] A contract of marriage is not to be viewed by the courts as an ordinary contract which the parties may at any time agree to rescind. It cannot be dissolved because the parties to it desire a dissolution; for the state, being a party to the contract will not give its consent to its abrogation. It cannot be annulled except in the manner provided by law.[11]

The legislature gives no definition of the terms it uses when it states for what causes divorces may be granted. Thus it does not define the terms "abandonment" nor "cruel and inhuman treatment," nor "reasonable provision" for the family. Interpretation of those terms is left to the courts. Of the vast number of divorce cases tried, very few reach the upper courts; and even there divided opinions occasionally occur. The tempers and the points of view of our *nisi prius* judges are as varied as the leaves of a tree. No two have exactly the same point of view of a contested, or an uncontested, case in any one of the three causes of divorce discussed in this article. Often a judge of easy-going mentality will grant a divorce on one of these subjects when another of more rigid views of divorce will refuse it; and each one honestly endeavoring to reach a just result. This is well illustrated in a case appealed to the Supreme Court. The trial judge had called a jury to try the case, and it made a special finding of the facts as shown by the evidence. Upon these findings the court refused a divorce, but when appealed, the Supreme Court reversed the case and directed the lower court to enter a decree granting a divorce. The case was one of "cruelty and abandonment."[12] This variance of views of judges is a subject of study in Marion County where any one of six of its judges can grant divorces; and it is quite common for one judge to have many more divorce cases pending before him than before any of the others; and yet each judge be equally informed upon the law of divorce and equally honest in granting or refusing divorces. Changes of venue are often taken on the ground of

[9] *Summers v. Summers*, 179 Ind. 8, 13, 100 N. E. 71 (citing *Barnett v. Barnett*, 27 Ind. App. 466, 61 N. E. 737; *Stewart v. Stewart*, 175 Ind. 412, 94 N. E. 564); *Darmen v. Darmen*, 38 Ind. App. 279, 78 N. E. 89.

[10] *Alexander v. Alexander*, 140 Ind. 555, 38 N. E. 855.

[11] *Alexander v. Alexander*, 140 Ind. 555, 38 N. E. 855.

[12] *Shores v. Shores*, 23 Ind. 546.

bias or prejudice of the trial judge in order to get the case before an "easy-going" judge; either one of the regular judges or a special one. And this is true frequently throughout the state where a change of venue is taken in order to secure a special judge who will view with more leniency the plaintiff's cause of divorce or defense than the regular judge.

Prior to the divorce act of 1873 the divorce statute provided that a divorce might be granted, after enumerating several causes for divorce, for "any other cause for which the court shall deem it proper that a divorce should be granted."[13] Where a judge granted a divorce in accordance with this provision an appeal lay to the Supreme Court, but there had to be an extreme abuse of power in the court to secure the reversal of a case granting a divorce.[14] No doubt the abuse of this power, even unintentionally, owing to the divergent views of *nisi prius* judges, led to its omission in the act of 1873.

ACT OF MARCH 10, 1873.

The statute now in force provides that a divorce may be granted for:

1. "Abandonment for two years";
2. "Cruel and inhuman treatment of either party by the other";
3. "The failure of the husband to make reasonable provisions for his family for a period of two years."[15]

It is proposed to treat only these three causes for divorce, limiting the discussion to Indiana cases, with a few exceptions. There is such variance of the statutes of the several states in prescribing causes for divorces for abandonment, cruel treatment and failure to provide, that decisions in such states cannot be implicity, even though with caution, relied upon. For that reason, and for the reason that a discussion of foreign cases, would tend to mislead and exceed the bounds of a paper of this kind, few references are made to cases from other states. "A divorce statute should not be construed in a spirit of improper liberality, nor with a view to defeat its ends, yet it should be construed strictly." But a party within its provisions should be granted relief.[16] And when a divorce might be granted before 1873 because the judge thought one should be granted, the Su-

[13] II, *Gavin v. Hord*, p. 81.

[14] *Ruby v. Ruby*, 29 Ind. 174; *Sullivan v. Sullivan*, 34 Ind. 368; *Gerner v. Gerner*, 38 Ind. 139; *Gullett v. Gullett*, 25 Ind. 517; *Tefft v. Tefft*, 35 Ind. 44.

[15] Burns' R. S. 1926, Sec. 1095, Subdivisions 3, 4 and 6.

[16] *Eikenberry v. Eikenberry*, 33 Ind. App. 69, 70 N. E. 837.

preme Court said, "The statute has not invested our courts with power to decree a divorce merely upon the notion that the parties should be separated, for some undefined reason, for which neither can legally claim a divorce against the others."[17]

ABANDONMENT

The statute uses the word "abandonment"; but frequently in the opinions of the courts the word "desertion" is inserted for "abandonment". It is usually conceded that the two words are synonomous. In other states the statutes frequently use the word "desert" or "desertion" and not the word "abandonment".[18] Abandonment under the divorce act is "the act of wilfully leaving the wife [or husband] with the intention of causing a separation between the parties, and implies an actual desertion of the wife by the husband" (or the husband by the wife).[19] In another case it is said "Abandonment" is "the act of a husband or wife who leaves his or her consort wilfully without justification * * * or by reason of wrongful conduct of the other, and with intention of causing a perpetual separation of the parties."[20] Abandonment or desertion is a breach of the matrimonial duty and consists of the actual breaking of the matrimonial cohabitation, coupled with an intent to desert, in the mind of the offender.[21] "According to the latest authorities, it may be laid down that legal desertion [or abandonment] in the present sense of our divorce acts, imparts three things: (1) An actual cessation of cohabitation for the period specified; (2) the wilful intent of the absent spouse to desert; (3) desertion by that spouse against the will of the other. Unless these three things concur, there is no legal desertion [or abandonment] established such as to justify a divorce in the petitioner's favor."[22]

Under these definitions it is quite clear that there can be no abandonment where the parties mutually agree to separate, or where the separation is with the tacit consent of the complaining spouse. "If the separation is by mutual consent there is no

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17 *Gullett v. Gullett*, 25 Ind. 517.

18 *Carr v. Carr*, 6 Ind. App. 377, 33 N. E. 805.

19 *Stornbaugh v. Stornbaugh*, 60 Ind. 275.

20 *Hill v. Taylor*, 186 Ind. 680, 683, 117 N. E. 930; *Carr v. Carr*, 6 Ind. App. 377, 33 N. E. 805.

21 *Crounse v. Crounse*, 107 Gratt. Va. 108, 60 S. E. 627; *Bailey v. Bailey*, 21 Va. 43; *Martin v. Martin*, 33 W. Va. 695, 11 S. E. 12; *Sneed v. Sneed*, 14 Ariz. 17, 123 Pac. 312, 40 L. R. A. (N. S.) 99.

22 Schouler on Husband and Wife, 516, quoted in *Barnett v. Barnett*, 27 Ind. 466, 61 N. E. 737.

desertion by either party."[23] "Desertion implies a want of consent, on the part of the complaining spouse."[24] Notwithstanding separation by mutual consent will not afford ground for a divorce, yet it may in time become such an one as will authorize the granting of a divorce. If one of the spouses in good faith requests the other to return, or offers in good faith to return to the other, and is met with a refusal in the first instance, to receive him or her, or if, in compliance with the request to return, the separation continues for two years, a divorce may be granted for desertion to the party making a request for a return or offering to return. But in such instance the two years will not begin until the request or offer of a return is made. The offer to return must be made in good faith with an intent to return, and an intention to return must be kept in good faith during the whole two years. And in the case of a request to return the request must be made in good faith with an intent to receive the other spouse and resume the marital relations; and that intent must be continuous until the two-year period has expired. No condition can be imposed in either instance. But there is a limit to the last statement. The husband has a right to choose the place of their residence. If he says, "I will receive you back if you will go and live with me", at a designated place, then the wife must accept the condition. Of course, it is possible that the selection of the husband is such a one as renders it impossible for the wife to comply with the request; as, for instance, in the heart of the wilds of Africa, or in case of a refined woman, in the heart of the slums of a great city. Such an offer may be construed as not made in good faith or with any expectation that it would be accepted. It may be taken as proof of the husband's intention never to receive his wife.

The conduct of a husband may be such as to drive his wife away. A mere request to leave, while insulting and painful to his wife, would not justify her leaving him. "If a husband drives the wife from home by his cruelty, this, besides being the statutory cause of cruel and inhuman treatment, will constitute a desertion on his part [not on her part]. When the cruelty to the wife is carried to the extent that she is compelled thereby to depart, it may be presumed that he intended such effect of his cruelty. Where both are equally at fault in causing the sep-

[23] *Hill v. Taylor*, 186 Ind. 680, 684, 117 N. E. 930 (citing *Belles v. Belles*, 50 Mich. 49, 14 N. W. 696; *Ingersoll v. Ingersoll*, 49 Pa. St. 249, 88 Am. Dec. 500; *Hart v. McGrew*, 11 Atl. (Pa.) 617; *Barnett v. Barnett*, 27 Ind. App. 466, 61 N. E. 737.

[24] *Summers v. Summers*, 179 Ind. 8, 100 N. E. 71 (citing *Barnett v. Barnett*, 27 Ind. App. 466, 61 N. E. 737).

aration, neither can get a divorce on the ground of desertion."[25] "To constitute a sufficient provocation for the departure of a wife with the purpose of permanently separating herself from her husband with a view to the dissolution of the marriage tie, the actual cause of such conduct on her part should be something which would be sufficient ground for a divorce."[26] When the husband drives the wife away he is guilty of a constructive desertion.[27] Such misconduct, to justify the wife leaving her husband must be such as in itself constitutes a ground for divorce.[28] "Nothing short of such conduct will justify a wilful separation or continuance of it. * * * Separation is not to be tolerated for light censure; and for slight causes which the law does not recognize as grounds for a divorce".[29]

What is true of the wife being driven from her husband's home, is true of the husband where his wife's conduct is such as to compel or justify his leaving her.[30]

"The refusal by the husband to follow his wife to a new residence does not constitute abandonment;"[31] for he has the legal right to choose the place of their residence; and it is her duty to follow him, although the place is not agreeable to her. When the abandonment has existed two years or over, and thereby a cause of action has accrued to the abandoned spouse, such spouse is not bound to receive back the other, and his or her cause of action for a divorce cannot be then defeated by an offer of the offending spouse to return.[32] The cause of action cannot be thus taken away or annulled. The offended party has a right to avail himself of it.

The plaintiff must charge in the complaint that the defendant "abandoned" her; it is not enough to say they "separated".

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[25] *Barnett v. Barnett*, 27 Ind. App. 466, 61 N. E. 737.

[26] *Barnett v. Barnett*, 27 Ind. App. 466, 61 N. E. 737 (citing *Oinson v. Heritage*, 45 Ind. 73, 15 Am. Rep. 258).

[27] *Summers v. Summers*, 179 Ind. 8, 10, 100 N. E. 71 (citing many cases).

[28] *Summers v. Summers, supra* (citing *Lynch v. Lynch*, 33 Md. 328; *Weigand v. Weigand*, 42 N. J. Eq. 699, 11 Atl. 113; *Sower's Appeal*, 88 Pa. St. 173).

[29] *Alkin v. Alkin*, 33 Wisc. 517, 11 S. E. 11; *Eshback v. Eshback*, 23 Pa. St. 343; *Graves' Appeal*, 37 Pa. St. 442; *Crounse v. Crounse*, 107 Va. 108, 60 S. E. 627; *Martin v. Martin*, 33 Wisc. 695, 11 S. E. 121; *Carr v. Carr*, 22 Gratt. (Va.) 68.

[30] *Summers v. Summers*, 179 Ind. 8, 10, 100 N. E. 71 (citing many cases).

[31] *Hill v. Taylor*, 186 Ind. 680, 684, 117 N. E. 930 (citing *Frost v. Frost*, 17 N. H. 251).

[32] *Ruby v. Ruby*, 29 Ind. 174.

But to allege that the defendant "deserted" the plaintiff is equivalent to a charge that he "abandoned" her. Nor is it too general.[33] Of course the complaint must show that the abandonment had existed at least two years. But where if the complaint alleged that the plaintiff and defendant were married and lived together as husband and wife until a date given when the defendant wholly abandoned the plaintiff, and they had not lived together since, it was held sufficient where the complaint had been filed more than two years after the given date of abandonment.[34] The complaint should state that the abandonment had been continuous from the date it took place. If there was more than one abandonment, then the date of the last one usually must be the one relied upon; for a resumption of the marital relations is a condonment of all prior instances of abandonment. But a wilful abandonment may be such as to efface the condonment and enable the plaintiff to rely upon a prior abandonment. It is not necessary to have, as it is in some states, a request made before bringing the suit for a resumption of the marital relations. That undoubtedly would be true where the abandonment was occasioned by the cruel treatment of the defendant spouse.

It must be shown that the defendant abandoned the plaintiff the required length of time to entitle him to divorce; and the burden is on the plaintiff to make such a showing. It is not enough to show a separation and that the defendant afterwards said he did not intend to live again with the plaintiff.[35] The fact of desertion may be proved by a variety of circumstances leading with more or less probability to that conclusion; "but the evidence as a whole must be clear and convincing." In one case the plaintiff testified to a system of quarrelsomeness and fault-finding on the part of the husband, by reason of which she felt constrained to leave his house. "I was afraid of my life," she said, "There was nothing in his conduct beyond coldness and indifference and finding fault with everything I did. He never struck me at any time." It was held that this did not show an abandonment because of cruel conduct.[37]

CRUEL TREATMENT

More cases are brought upon the ground of "cruel and inhuman treatment" than upon any other—perhaps more than upon

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[33] *Carr v. Carr*, 6 Ind. App. 377, 33 N. E. 805.
[34] *Cummins v. Cummins*, 30 Ind. App. 671, 66 N. E. 915.
[35] *McCoy v. McCoy*, 3 Ind. 555.
[36] *Hill v. Taylor*, 186 Ind. 680, 684, 117 N. E. 930.
[37] *Stanbaugh v. Stanbaugh*, 60 Ind. 275.

all the other grounds for divorce. This subject is a prolific source of divorces. And it is here where *nisi prius* judges greatly differ as to what is and what is not cruel and inhuman treatment when the border line is reached. The state reports are full of cases on this subject; and to set forth a synopsis on these cases would of itself make a small sized volume. Statutes of the various states, too, differ in the language used granting divorces for cruelty. Some of them are much more stringent than the Indiana statutes; and occasionally is one more lenient. In this article we cannot set out the facts in each Indiana case showing what was or what was not cruel and inhuman treatment. Each case must be examined for that. In one case our Supreme Court, along the line of this section, said: "We quite agree with counsel for appellant, that frequently our trial courts are too liberal in granting decrees of divorce on the ground of cruelty, and that public policy requires that the marital relation shall not be severed, families disrupted, and innocent children deprived of the companionship, counsel and affection of both parents, without adequate cause."[38]

The statute provides for a divorce for "cruel and inhuman treatment". 'Cruelty' is defined to mean to give pain, or torment, or vex or afflict, or cause grief or misery. 'Inhuman' is defined to mean, destitute of the kindness and tenderness that belong to a human being.[39] A text writer of note has defined "Cruelty" as "any conduct in one of the married parties which, to the reasonable apprehension of the other, or in fact, renders cohabitation physically unsafe, to a degree justifying a withdrawal therefrom".[40] As facts in one case may constitute cruelty and not in another, each case must be determined upon its own facts in deciding whether the defendant was guilty of cruel and inhuman treatment of the other spouse.[41] In the former case it was said, "What constitutes cruel and inhuman treatment must be determined by the facts of the given case."

"Cruelty is a relative term; its exactness frequently depends upon the character and refinement of the parties, and the con-

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[38] *Stewart v. Stewart*, 175 Ind. 412, 417, 94 N. E. 864.

[39] *Graft v. Graft*, 76 Ind. 136.

[40] Bishop, on Marriage and Divorce, Sec. 1531. For an earlier definition of Bishop, approved by our Supreme Court by quoting it, see *Small v. Small*, 57 Ind. 568; and for a criticism of this former definition, see *Eastes v. Eastes*, 79 Ind., 371, as not being broad enough: "Anything that tends to humiliate or annoy may as effectually endanger life and health as personal violence, and will afford ground for divorce." *Zweig v. Zweig*, 46 Ind. App. 94, 93 N. E. 234.

[41] *Massey v. Massey*, 40 Ind. App. 407, 80 N. E. 977, 81 N. E. 732.

clusion to be reached in each case must depend upon the character and refinement of the parties, and upon its own particular facts." In determining what constitutes cruel and inhuman treatment it will be determined by the facts of a given case, the situation of the parties, their social standing and their morality and refinement.[43]

It should be observed that our statute requires both cruel and inhumant treatment. If it granted divorces merely for "cruel treatment" then the doors would be opened wide for all kinds of cruelty, however little it might be. By the linking of that word with inhuman, some attempt to limit it in its application was made. Mere cruelty is not enough; it must be sufficient to be "inhuman". This fact is sometimes lost sight of. From the cases the inference may be deducted that the cruelty must be sufficient to impair (not the comfort or happiness alone) the health of the victim. Of course health may be impaired by mere mental distress.

In all divorce proceedings for cruel and inhuman treatment the character and refinement or non-refinement of the plaintiff is a subject of inquiry or observation and consideration; and a judge who fails to take this carefully into consideration will often make mistakes. The better judge he is of character, the better knowledge he has of human character and conduct, the better result he will reach in actions of this kind, and fewer mistakes he will make. And it may be put down as a fact that what is cruelty and inhuman treatment to one person is not to another, because of their physical make up and difference in mental character. All the cases tacitly or openly proceed upon this theory.[44] "We do not divorce savages and barbarians," said the court in one case, "because they are such to each other. We cannot exercise sound judgment in divorce cases without studying the acts complained of in connection with the character of the parties, and for this we want the common sense of the jury rather than fixed legal rules."[45] "Among half-civilized and brutal people, blows might be exchanged between married couples, who, in the main are happy and have no desire to part. Nor should a false and malicious charge of adultery be held, in all

[42] *Kelley v. Kelly*, 18 N. W. 19, 1 Pac. 194, 51 Am. Rep. 732, quoted in *Massey v. Massey*, 40 Ind. App. 407, 409, 80 N. E. 937, 81 N. E. 732; *Stewart v. Stewart*, 175 Ind. 412, 417, 94 N. E. 564.

[43] *Zweig v. Zweig*, 46 Ind. App. 94, 93 N. E. 254.

[44] *Graft v. Graft*, 76 Ind. 136, 138; *Massey v. Massey*, 40 Ind. App. 407, 410, 80 N. E. 937, 81 N. E. 732.

[45] *Richards v. Richards*, 37 Pa. St. 225, quoted in *Massey v. Massey, supra.*

cases, such cruel and inhuman treatment as would justify a divorce. In all cases the character and condition of the parties and their surroundings should be considered."[46] "The conduct of the husband in abusive language, treatment and demeanor toward his wife might cause greater suffering to a refined and gentle woman than an act of violence. Such conduct might well be considered as cruel and inhuman treatment. The blows thus inflicted may cause deeper anguish than physical injuries to the person, more enduring and lacerating to the wounded spirit of the gentle woman than actual violence to the person, even though severe. It would make no difference to such a woman whether she received a blow upon the head or the heart."[47]

To constitute "cruel and inhuman treatment" it is not necessary to show physical violence and the like. Under the older authorities that was necessary, and a divorce would not be granted unless there was some actual violence, attended with damages to health or life, or at least some reasonable apprehension of such violence must first have been shown.[48] That there can be cruel and inhuman treatment without physical violence is now well established.[49] "Both a sound mind and a sound body are necessary to health. Therefore whatever threatens to and does impair either or both, endangers life or health and constitutes cause for divorce under our statute."[50]

Under this head can be found a number of cases, each varying in its scope and facts. Usually the accusation of adultery on the part of the wife is accompanied by physical blows and like conduct. But there are many cases where no physical contact took place. The extent of the accusation is carried, and what publicity is given to the charge is a matter of vital consideration. All the cases I believe are instances where the accusation was made in the presence of others; and none when it was made only in the presence of the two spouses. Where a husband openly accused, in the presence of others, his wife with having committed adultery, it was said: "A husband could hardly, by any other means, cause a virtuous wife more mental pain, torment,

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[46] *Stewart v. Stewart*, 175 Ind. 412, 417, 94 N. E. 864; *Zweig v. Zweig* 46 Ind. 94, 93 N. E. 234.

[47] *Zweig v. Zweig*, 46 Ind. App. 94, 93 N. E. 234. There may be a constantly recurring form of cruelty that may be less tangible (than physical violence) yet in its effect more deadly and extreme. *Root v. Root*, 164 Mich. 638, 130 N. W. 194, 32 L. R. A. (N. S.) 837; *Alberding v. Alberding*, 107 La. 715, 31 So. 1038.

[48] *Dickinson v. Dickinson*, 54 Ind. App. 53, 102 N. E. 389.

[49] *Massey v. Massey*, 40 Ind. App. 407, 80 N. E. 977, 81 N. E. 732.

[50] *Zweig v. Zweig*, 46 Ind. App. 594, 93 N. E. 234.

vexation, affliction, grief and misery, than to falsely charge her with the crime of adultery, and slanderously report the same around among her neighbors; and in doing so he would be guilty of a great unkindness and want of tenderness toward her. A greater violation of the marital vow, to protect and defend the reputation as well as the person, of a wife, the husband could not commit, than to wantonly traduce and vilify her character."[51] In passing upon another case the court said: "After forty years of wedded life, after appellee had borne her husband six children, there is flaunted in the face of a virtuous wife, in the presence of her children, a charge likely to cause more actual mental torture than any other which fiendish ingenuity might devise. This is cruel and inhuman treatment within the meaning of our statute, under the circumstances here shown."[52]

A charge of infidelity made by the wife against her husband may be alleged by him in a petition for a divorce on the ground of cruel treatment.[53] A husband is entitled to a divorce for cruelty inflicted upon him by his wife. The statute says "either" party.[54]

Will a single accusation of adultery in his wife by the husband afford her sufficient cause for a divorce if constructed? There is no case on this subject, as previously stated. Because of the character of the wife or her mental sensitiveness it might not be considered by her serious. And of course it would not then be cruel treatment for her. The manner in which the charge was made is of weight. If not made in the presence of another that would be a matter to be considered. The charge, to constitute a cause for divorce, must not only be false but maliciously made. If the woman be one of culture and refinement, of high social standing, and made with the belief that it is true, I think it sufficient if made seriously, with belief of its truthfulness, even out of the presence of others, and of course much

[51] *Graft v. Graft*, 76 Ind. 136, 138; *Massey v. Massey*, 40 Ind. App. 407, 410, 80 N. E. 937, 81 N. E. 732; *Edwards v. Edwards*, 72 Ind. App. 638, 125 N. E. 468; *Dickinson v. Dickinson*, 54 Ind. App. 53, 109 N. E. 389; *Cooper v. Cooper*, 51 Ind. App. 374, 99 N. E. 782; *Morse v. Morse*, 25 Ind. 156.

[52] *Stewart v. Stewart*, 175 Ind. 412, 418, 94 N. E. 564; *Massey v. Massey, supra; Zweig v. Zweig*, 46 Ind. App. 94, 93 N. E. 234.

[53] *Massey v. Massey*, 40 Ind. App. 407, 410, 80 N. E. 937, 81 N. E. 732; *Day v. Day*, 5 Alaska, 585. See also, *Stewart v. Stewart*, 175 Ind. 412, 417, 44 N. E. 564. Especially when connected with other acts of cruelty. *Shores v. Shores*, 23 Ind. 546. See *Spitzmesser v. Spitzmesser*, 26 Ind. App. 532, 60 N. E. 315.

[54] *Spitzmesser v. Spitzmesser*, 26 Ind. App. 532, 60 N. E. 315; *Massey v. Massey*, 40 Ind. App. 407, 80 N. E. 977, 81 N. E. 732.

more so if repeated. Such a charge would likely drive from the wife all love for her husband and greatly wound her feelings, probably to the extent of impairing her health. Its effect, however, would be a subject for investigation at the trial. In all cases such a charge could not be a cause for a divorce, as in the case of an unrefined, course and sensual woman. She probably would retort with a like charge against her husband.[55]

Abandonment and failure to provide may be cruel treatment sufficient to authorize the granting of a divorce. In this way the proceeding for a divorce might be brought before the two year period after the abandonment or failure to provide had expired.[56] Thus when a husband within three years after his marriage abandoned his wife and their infant child, left the state, and without explanation, ceased all correspondence with her, left her dependent upon her own labor and the charity of friends for her support and that of her child, it was held that he was guilty of cruel and inhuman treatment of his wife. "To a sensitive spirited woman such treatment would be more cruel and inhuman than the infliction of corporal punishment and severe injuries to her; for mental suffering and public shame and disgrace are more difficult to be borne then mere physical pain."[57] But this rule may be pushed too far. Whether or not the abandoning of the wife by the husband can be treated as cruel and inhuman treatment depends upon the particular facts of each case. He may leave her in such condition she can readily obtain support. If she have no child to support, it would have to be a very strong case to enable her to secure a divorce for cruelty. But suppose she was ill, abed, so much so as to be unable to live, without food and fire in the house and without friends and acquaintances, then a very different case would be involved, especially if she lay unattended for some days. It certainly would be cruel and inhuman treatment.

Where a husband brings suit against his wife on the ground of cruel and inhuman treatment, he must go farther than if she were to bring one. "He must make out a clear case."[58] If no

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[55] See *Stewart v. Stewart*, 175 Ind. 412, 417, 94 N. E. 564. "Nor should a false and malicious charge of adultery be held in all cases such cruel and inhuman treatment as would justify a divorce. * * * 'Cruel and inhuman treatment', one of the statutory causes for divorce in Indiana, is, like negligence, a relative term and of necessity must depend upon the circumstances of each particular case." Ibid 417.

[56] *Eastes v. Eastes*, 79 Ind. 363.

[57] *Eastes v. Eastes*, 79 Ind. 363, at 370.

[58] *Aurand v. Aurand*, 157 Ill. 321, 41 N. E. 859; *Foster v. Foster*, 79

acts of violence be charged, "it must clearly appear from the facts in the case that the acts of the wife have rendered the continuance of the marital relation so intolerable to the husband as to endanger his physical well being."[59] He must clearly show that his own deportment did not contribute to the wrong he complains of.[60]

If a husband communicate to his wife a loathsome sexual disease—even though he had contracted the disease before their marriage, and the communication was shortly thereafter, she may abandon him and secure a divorce on the ground of cruel treatment. In one case it was said: "His conduct was not only vile, but it was infamous. It was bad enough for him to violate his marital vows, but when followed by infecting the wife with a loathsome disease, the depth of infamy had been sounded. The law does not require that the wife shall abuse herself to the extent of condoning the adulterous conduct of the husband; much less is she required to jeopardize her health and life in order that she may receive food, raiment and shelter from his iniquitous hand. She is entitled to enjoy his good fortunes and bound to share his misfortunes, but she is not required to share his ignominy and shame, or to imperil her life and health on account of his wrong."[61] In aid of the necessary proofs of knowledge the presumption is that he was aware of his own diseased condition and danger of infection.[62]

Mere cold neglect may be cruel and inhuman treatment. "Conduct which produces perpetual social sorrow, although physical food be not withheld, may be classed as cruel and entitle the sufferer to relief."[63] Unwarranted and unjustifiable conduct may be sufficient.[64] Thus in a complaint it was alleged that the husband for more than two years had refused to speak to his wife, that he refuse to visit their neighbors with her, and did not permit them to visit her, was held to state a cause for a divorce.[65] On due showing that the defendant husband had

Ind. App. 345, 138 N. E. 360. See also, *De La Hey v. De La Hey*, 21 Ill. 251, and *Doyle v. Doyle*, 26 Mo. 545.

[59] *Massey v. Massey*, 40 Ind. App. 410, 80 N. E. 937 (distinguishing *McAllister v. McAllister*, 71 Texas 695, 10 S. W. 294).

[60] *Foster v. Foster*, 79 Ind. App. 345, 138 N. E. 360.

[61] *Carr v. Carr*, 6 Ind. App. 377.

[62] *Porter v. Caylor*, 146 Ind. 448, 46 N. E. 648; Bishop on Marriage and Divorce, Sec. 735.

[63] *Rice v. Rice*, 6 Ind. 100, quoted in *Massey v. Massey*, 40 Ind. App. 407, at 410.

[64] *Dickinson v. Dickinson*, 54 Ind. App. 53, 102 N. E. 389.

[65] *Zweig v. Zweig*, 46 Ind. App. 594, 93 N. E. 234, quoting *Banner v. Banner*, 96 Calif. 171, 30 Pac. 298, 16 L. R. A. 660.

accused plaintiff of stealing his money, with having sexual intercourse with his son, with adultery with other men; that he called her a liar and applied vulgar epithets to her, that he tormented her and made cruel remarks concerning her physical appearance; that he often would not speak to her for a period of two weeks, except to quarrel with her, and that he told her a number of times that he would be the happiest man on earth when he got rid of her, it was held that a divorce had been properly granted her.[66]

Refusal to have intercourse with her husband is not sufficient for a divorce, even though made without cause and though he desire children;[67] unless, at least there is no showing that there was good cause for such refusal.[68]

A mutual or non-mutual separation followed by offer of the plaintiff to resume the marriage relation and a refusal on the part of the defendant cannot be construed as cruel treatment.[69] A groundless prosecution of the husband by the wife for an alleged crime, resulting in his trial and acquittal, is not "cruel and inhuman treatment" within the meaning of the statute.[70] Refusal of the wife to join in a conveyance of the husband's lands is not cruel treatment. This she had a right to do.[71] If the wife attacks the husband physically, compelling him to defend himself or suffer serious injury in all likelihood, then in his defence, striking her is not cruel treatment, if not carried to an extreme.[72]

Quarrels and disagreements are not cruel treatment, such as will warrant the granting of a divorce.[73] Neither uncontrolability of temper nor the many misunderstandings and bickerings which are characteristic of the marriage relation in a considerable percentage of cases are grounds for divorce; "and those who have married must bear the real and principal burdens they have assumed, unless the conduct of the one entitles the other,

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66 *Dickinson v. Dickinson*, 54 Ind. App. 53, 102 N. E. 389.

67 *Pinnebad v. Pinnebad*, 134 Ga. 496, 68 S. E. 73; *Stewart v. Stewart*, 78 Me. 548, 7 Atl. 473, 58 Am. Rep. 822; *Cowles v. Cowles*, 112 Mass. 298; *Burton v. Burton*, 52 N. J. Eq. 215, 27 Atl. 825.

68 *Foster v. Foster*, 79 Ind. App. 345, 138 N. E. 360.

69 *Ruby v. Ruby*, 29 Ind. 174; *Alkin v. Alkin*, 33 W. Va. 517, 11 S. E. 11; *Eshback v. Eshback*, 23 Pa. St. 343; *Martin v. Martin*, 33 W. Va. 695, 11 S. E. 12.

70 *Small v. Small*, 57 Ind. 568.

71 *Hoffman v. Hoffman*, 40 Ind. App. 476, 82 N. E. 477.

72 *Coleman v. Coleman*, 143 Ind. 172, 43 N. E. 470.

73 *Sneed v. Sneed*, 14 Ariz. 17, 122 Pac. 312; *Connor v. Connor*, 107 La. 453, 31 So. 766; *Graff v. Graff*, 136 La. 750, 67 So. 817; *Burns v. Burns*, 173 Ky. 105, 190 S. W. 683.

that other being without fault, to the severance of the relation for one or the other of the statutory causes."[74] "The law does not permit courts to sever the marriage bond and to break up households, merely because parties, from unruly tempers or mutual neglect, live unhappily together. It requires them to submit to the ordinary consequences of human infirmities."[75] Violence committed during a quarrel, in which the husband suffers as well as his wife, is not such cruelty as will sustain a divorce against him.[76] "A contract of marriage is not to be rescinded by the courts as an ordinary contract which the parties may at any time agree to rescind. Neither can the court itself on learning that the parties have had petty quarrels, and have scolded and called one another hard names, come to the conclusion that they would be better apart. Before a divorce can be granted there must be found an injured party and a guilty party. Society and the state are interested in upholding the marriage relation, and the statutory safeguards thrown around it will therefore be strictly insisted upon. No divorce will be granted except in the manner provided by law."[77]

A complaint must come within the terms of cruel and inhuman treatment; but one which alleges that for several years her husband struck, kicked and choked the plaintiff is sufficient.[78] If it charges both cruel treatment and abandonment the plaintiff is not required to prove both to secure a divorce. One is sufficient.

Failure to Support

The statute authorizes the granting of a divorce for the "failure of the husband to make reasonable provision for his family for a period of two years."[80]

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[74] *Root v. Root*, 164 Mich. 638, 130 N. W. 194, 32 L. R. A. (N. S.) 837.

[75] *Cooper v. Cooper*, 17 Mich. 205, 97 Am. Dec. 182 (Judge Cooley); *Rose v. Rose*, 50 Mich. 92; *Johnson v. Johnson*, 49 Mich. 640. See also, *Darmen v. Darmen*, 38 Ind. App. 279, 78 N. E. 892; *Alexander v. Alexander*, 140 Ind. 555, 38 N. E. 855; *Barnett v. Barnett*, 27 Ind. App. 466, 61 N. E. 737.

[76] *Seper v. Seper*, 29 Mich. 308; *Cooper v. Cooper*, 10 La. 249.

[77] *Alexander v. Alexander*, 140 Ind. 555, 38 N. E. 855; *Darmen v. Darmen*, 38 Ind. App. 279, 78 N. E. 89. "The courts cannot encourage any inclination or tendency to regard the obligation of wifehood and motherhood as insufferably irksome." *Barnett v. Barnett*, 27 Ind. App. 466, 61 N. E. 737.

[78] *Mercer v. Mercer*, 114 Ind. 558, 17 N. E. 182.

[79] *Skinner v. Skinner*, 47 Ind. 670, 95 N. E. 128.

On appeal, when attacked for the first time, it will be held sufficient if it will bar another action; *Summers v. Summers*, 179 Ind. 8, 13, 100 N. E. 71; *Dickinson v. Dickinson*, 54 Ind. App. 53, 102 N. E. 389.

[80] Burns' R. S. 1926, Sec. 1926, Sub. Div. 6.

The fifth statutory cause for divorce in the original Act reads "Habitual drunkenness of either party, or the *failure of the husband to make reasonable provision for his family.*" Under this clause no length of time for a failure to support is stated. This clause was omitted by the commissioners in the Revised Statutes of 1881; and it has been omitted in every revision since then, except that of 1897. If it is in force then the sixth clause is useless. In practice it is usually treated as repealed by this sixth clause, the latter being the last expression of the legislature. In but one case is this omitted clause repeated, and there only a reference is made to it.[81] I think there is no doubt but what it is repealed.

If a wife abandons her husband or refuses to live with him, then he is not bound to support her.[82] He is not required to support her at any other place than his home;[83] but if he refuses to receive her back after she has gone away he will come within the provision of the statute.[84] But where a husband and wife mutually agreed to and did separate, and he contributed nothing to her support, even during her illness following an operation, it was held that she was entitled to a divorce.[85] Where a wife left her husband's home because he could not support her; and afterwards on his getting into better financial condition, he requested her to return, and she refused, not intending to renew the marital relations, it was held that the requisite time having expired after the refusal he was entitled to a divorce. But this was upon the ground of abandonment.[86] If the parties mutually agree to and do separate, then a request by the wife for support is necessary before he will be charged with failure to provide.[87] Where a husband had practically no property, home nor money, when he married, and his wife was living with her widowed mother on a farm; and during the six weeks in which they sustained the relation of husband and wife they lived at the home of the mother, wherefrom he left his wife, saying that he was going to bring suit for a divorce, and soon thereafter brought suit against the mother for damages for causing a sep-

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81 *Eastes v. Eastes*, 79 Ind. 363, 370.

82 *Barnett v. Barnett*, 27 Ind. App. 446, 61 N. E. 737; *Fuller v. Fuller*, 108 Ga. 256, 33 S. E. 865.

83 *Fowler v. Fowler*, 138 Ky. 326, 127 S. W. 1014.

84 *Wendling v. Wendling*, 134 N. Y. Supp. 55.

85 *Stevenson v. Stevenson* (Utah), 190 Pac. 776; *Hurlburt v. Hurlburt*, 14 Vt. 561. See *Barnett v. Barnett*, 27 Ind. App. 466, 61 N. E. 737.

86 *Freeman v. Freeman*, 94 Mo. App. 504, 68 S. W. 389.

87 *Barnett v. Barnett*, 27 Ind. App. 466, 61 N. E. 737 (citing *Oinson v. Heritage*, 45 Ind. 73, 15 Am. Rep. 288).

aration; and he wrote a letter to his wife asking her to leave her mother and come to him, but did not offer to furnish her means to come to him, nor provide for her support, which condition existed for the statutory period, it was held that she was entitled to a divorce on the ground of a failure to support.[88]

The statute contemplates that a husband, before he can be charged with failure to provide for his family, must be able to make reasonable provision for them. Thus an insane husband cannot be charged with failure to support[89] though his estate may be for her support. If a husband be without property and is so sick as not to be able to earn wages, then he cannot be charged with failure to support, under the statute. The statute does not require of him the impossible. It is frequently a question to what extent a husband must make provision for his family. The statute says "reasonable provision". In a Michigan case it is said "The husband being of sufficient ability, is bound to afford to his wife support reasonably consistent with his own means and station."[90] If a husband be a man of average industry and economy earning what he has and devoting it to the support of his family, that is all that is required of him; and if he does that he cannot be charged with failure to make reasonable support for his family; and the fact that the wife used her own funds to assist in such support does not entitle her to a divorce.[91] The poverty or straightened circumstances of the husband which are the result of misfortune or temporary inability to secure employment even if it entails hardships upon the wife, which he shares, is not grounds for divorce.[92] The wife is not entitled to a divorce merely because she is not supported to the extent and in the style in which she was supported by her father before marriage.

It must be kept in mind that the earnings of a wife in this state belong to the husband and not to the wife. It has been held in some states that if the wife wishes to enter commercial employment or earn money in other ways, and thus earn sufficient money for her support, then the husband cannot be charged with failure to make reasonable provision for her.[93] But she is not bound to enter into employment for her own support; it

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88 *Turner v. Turner*, 26 Ind. App. 677, 60 N. E. 718.

89 *Baker v. Baker*, 82 Ind. 46.

90 *Root v. Root*, 164 Mich. 638, 170 N. W. 194, 32 L. R. A. (N. S.) 837.

91 *Fowler v. Fowler*, 138 Ky. 326, 127 S. W. 101.

92 *Stevenson v. Stevenson* (Fla.), 94 So. 860.

93 *Hansen v. Hansen*, 27 Cal. App. 401, 150 Pac. 70. See *Locke v. Locke*, 153, Cal. 50, 94 Pac. 244; *Branch v. Branch*, 30 Colo. 429, 71 Pac. 632; *Washburn v. Washburn*, 9 Cal. 475; *Rycroft v. Rycroft*, 42 Cal. 444.

is voluntary with her. The rule given above obtains in the states where the law of community property prevails. But it does not obtain in all states. Thus in a case in Washington it was said:

"It is the duty of a husband to support his wife while living with her and he cannot absolve himself from that duty by deserting her without cause. The failure of the husband to make suitable provision for his family is made a cause for divorce by the statute. The duty of the husband to support the wife is a continual one, operating upon him from day to day, and when he has violated that duty for a sufficient length of time to show a settled purpose to disregard it, the wife may have the marriage relations dissolved. The findings show a wilful breach of duty on the part of the husband, dispite his ability to discharge that duty. His conduct is no less reprehensible because the wife refused to work and maintain herself. He has broken the bond and the statute provides the measure of relief."[94]

In actions for support it is no defense that the wife has property of her own sufficient to support her. "The duty which the law imposes upon the husband to support his wife is absolute and not dependent upon her ability to support herself by her own labor or out of her own property."[95]

A failure of a husband to provide reasonable means of support for his family must be without just cause, if the wife is to obtain a divorce on this ground.[96] That a husband does not give his wife money is not a failure to support.[97] If the wife knows her husband has credit at a store and knows that she can go there to get things on his credit which are necessary for her and the family's support, then she cannot successfully charge that he failed to support her. It is sufficient that he provided the

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[94] *Merriam v. Merriam*, 75 Wash. 389, 134 Pac. 1058. In actions for support it is no defense that the wife has property of her own sufficient to support her. "The duty which the law imposes upon the husband to support his wife is absolute, and not dependent upon her ability to support herself by her own labor or out of her own property." *Stephens v. Stephens*, 102 Minn. 301, 113 N. W. 913; *White v. White*, 50 Ill. App. 149. See *Austin v. Austin*, 42 Colo. 130, 94 Pac. 309 (wife's means inadequate).

In California if the wife have ample means for her support from her own property, and the husband's earning capacity and resources is not great, she is not entitled to divorce on the ground of failure to support. *Baker v. Baker*, 168 Cal. 346, 143 Pac. 607, Ann. Cases 1916A, 854.

[95] *Svanda v. Svanda*, 93 Neb. 404, 140 N. W. 777, 47 L. R. A. (N. S.) 666; *Gallotly v. Gallotly*, 185 Mich. 382, 151 N. W. 1057; *Bower v. Bower*, 179 Mich.—146 N. W. 271, 51 L. R. A. (N. S.) 460; Taylor v. Taylor 20 N. M. 13, 145 Pac. 1075; *Garland v. Garland*, 66 Wash. 226, 119 Pac. 386; *Uhler v. Uhler*, 128 N. Y. Supp. 963; *Dashbeck v. Dashbeck*, 62 Mich. 322; *Hurlburt v. Hurlburt*, 14 Vt. 561.

[96] *Donley v. Donley*, 150 Mo. App. 660, 131 S. W. 356.

[97] *Sailard v. Sailard*, 2 Tenn. Ct. App. 396.

means whereby she could get support.[98] Failure to provide the wife with necessary medical treatment may be a failure to support.[99] As has been seen elsewhere, failure to provide for the wife may under extreme circumstances be held to be cruel treatment.[100]

CONDONATION

The doctrine of condonation is applicable to instances of cruel treatment.[101] It is conditioned that it will cease and upon its repetition the former wrongs are revived.[102] Usually it will be presumed from proof of cohabitation;[103] but proof in cases of cruelty will not be inferred from proof of a single act of intercourse.[104]

The plaintiff must come into divorce court, just as in a court of equity, with "clean hands". "Divorce laws are made to give relief to the innocent, not to the guilty."[105] If the plaintiff has been guilty of such conduct as would entitle the defendant to a divorce, then he must fail.[106] Thus a plaintiff guilty of adultery is not entitled to a divorce on the ground of abandonment.[107] It is the duty of the court to examine the plaintiff on this subject, in the absence of a defense at least; and it may do so when a defense is being made.

Where the custody of a child was involved in an action, the introduction in evidence by the husband of evidence falsely charging the wife, the husband not knowing it was true, with having committed adultery, and was not fit to have custody of the child, it was held such conduct barred the husband from obtaining a divorce.[108] This would be true where he sought a

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[98] *Mercer v. Mercer*, 114 Ind. 558, 17 N. E. 182.

[99] *Eastes v. Eastes*, 79 Ind. 367.

[100] *Sullivan v. Sullivan*, 34 Ind. 368; *Clogne v. Clogne*, 46 Minn. 462; *Dunn v. Dunn*, 36 Neb. 141.

[101] *Rose v. Rose*, 87 Ind. 481.

[102] *Wolverton v. Wolverton*, 163 Ind. 26, 71 N. E. 123.

[103] *Wolverton v. Wolverton, supra; Phillips v. Phillips*, 1 Ill. App. 245; *Cox v. Cox*, 1 S. W., *supra* (N. Y.) 223; *Doe v. Doe*, 52 Hun 405.

[104] *Hoff v. Hoff*, 48 Mich. 281, 12 N. W. 160.

[105] *Edward v. Edward*, 72 Ind. App. 638, 25 N. E. 468; *Christenberry v. Christenberry*, 3 Blackf. 202 (adultery in plaintiff before the passing of the present statute).

[106] *Eikenberry v. Eikenberry*, 33 Ind. 69, 70 N. E. 837 (a very lucid decision on the question).

[107] *Edward v. Edward*, 72 Ind. App. 638, 125 N. E. 468.

[108] *Ibid.* On the general question, see *Wheeler v. Wheeler*, 18 Ore. 261, 24 Pac. 900; *Beckley v. Beckley*, 23 Ore. 226, 210 Pac. 470; *Morrison v. Morrison*, 64 Mich. 53, 30 N. W. 903; *Church v. Church*, 16 R. I. 668, 7 L. R. A. 385.

divorce by a cross-bill filed in her action for a divorce. The falsity of such a charge would be his right to a divorce in the event she failed.[109]

It must be alleged in the complaint that the plaintiff and defendant are separated[110] and proven. Sometimes the parties, though proceedings be pending between them for a divorce, continue to remain in the same dwelling house which they inhabited before proceedings were begun, but not cohabitating. "Ordinarily the dwelling together of husband and wife under one roof would authorize the presumption that all marital relations exist, but the presumption must give way to direct proof that they had not lived and cohabitated together as man and wife" before the bringing of suit for divorce nor at any time since then.[112]

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[109] *Burns v. Burns*, 60 Ind. 289.

[110] *Bruner v. Bruner*, 192 Ind. 479, 35 N. E. 578.

[111] *Bruner v. Bruner, supra; Dennison v. Dennison*, 4 Wash. 705, 30 Pac. 100.